No. 86-1917

Supreme Court, U.S.
FILED
JUL 27 1987
JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States

October Term, 1986

BARNES-HIND/HYDROCURVE, INC., and
BARNES-HIND INTERNATIONAL, INC.,

Petitioner,

vs.

BAUSCH & LOMB INCORPORATED,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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July 23, 1987

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In our petition, we asked that a writ be issued because the Federal Circuit did not give proper weight to the findings of the District Court, particularly dispositive findings numbers 46 and 49 (Pet. pp. 13 and 26a), and had made its own subtest finding that Caddell taught away (Pet. p. 15). We noted that the District Court had made Graham findings (Pet. pp. 7-13) and had given proper weight to the presumption of validity by using the clear and convincing standard (Pet. p. 14).

We referred to oral testimony and questions by the District Court to establish that there was sufficient evi-

dentiary support for findings 46 and 49.* We submit that finding 49** alone rebuts the presumption of validity; also, as a factual finding not clearly erroneous, it should have been sufficient to require affirmance. Bausch & Lomb does not even address this finding.

The other finding as to Caddell, finding 46†, identifies one way of using the laser beam with high enough intensity to vaporize the material without melting it. This finding was supported by trial testimony even by Bausch & Lomb's expert Dr. Mandell—"that's how it would work out" (Pet. p. 10). The District Court heard extensive testimony as to Caddell, made many findings addressed to Caddell‡ and did not merely select a single line out of the entire Caddell patent as suggested. (Resp. Br. p. 10). Bausch & Lomb refers to trial testimony to support the Federal Circuit's factual interpretation, but Bausch & Lomb's argument does not meet the issue as to whether the District Court's finding as to the technical interpretation of Caddell is subject to Rule 52. The Federal Circuit should not therefore have

* Bausch & Lomb states that the transcript was unavailable at the time the findings were entered (Resp. Br. p. 8), but the District Court had copious notes (Pet. 45a), paid close attention at trial, asked numerous questions and presumptively was entirely knowledgeable about the trial testimony.

** "The examiner allowed the patent over Caddell only because plaintiff urged upon the examiner the unfounded and contrived distinction between cross-linked and non-cross-linked materials, and the false arguments regarding the propensity of non-cross-linked materials to form a ridge."

† "The Caddell patent teaches two ways of achieving a ridgeless depression; the first is to use a laser beam having a high enough intensity to *vaporize* the material without melting it, and the second is to use a material such as Delrin which tends to leave sharp edges when *melted*."

‡ Findings 26-28, 31-37, 43-49.

disregarded the finding on Caddell unless it was found to be clearly erroneous.

It was improper for the Federal Circuit to make a factual determination as to the subtest, that Caddell taught anyway. Bausch & Lomb now argues that subtests require the application of "correct legal standards" (Resp. Br. p. 16). This would in effect make each subtest finding reviewable on appeal as to whether the proper legal standard was applied. This view is legally erroneous and also raises the same issue as was previously before this Court as to the weight to be given to the District Court's factual determinations as to obviousness, and is now again before the Court on the *Dennison* petition, and is also addressed in our main brief on this petition.

Bausch & Lomb's enumeration of so called legal errors of the District Court and the Federal Circuit's "observation" to guide "a very misguided District Court" (Resp. Br. pp. 16-17) does not substitute for the requirement that findings of fact be respected on appeal unless they are held to be clearly erroneous.

We therefore request that the petition be granted.

Respectfully submitted,

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